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August 20, 2013

**VIA ECF**

The Honorable James L. Robart  
United States District Court  
Western District of Washington  
700 Stewart Street, Suite 14128  
Seattle, WA 98101-9906

**Re: Microsoft Corp. v. Motorola, Inc., et al., No. 10-cv-1823-JLR**

Dear Judge Robart:

We write in response to Motorola's submission of its Defendants' Revised Proposed Preliminary Instructions (Dkt. No. 857) and the accompanying letter from Motorola's counsel (Dkt. No. 858). In particular, Microsoft seeks to clarify Motorola's submission of a Revised Proposed Preliminary Instruction No. 18 and Final Instruction No. 11 on "stipulated facts." (*See* Dkt. No. 857 at 7–11.)

Motorola's submission does not contain stipulated facts. Motorola's counsel did not contact Microsoft's counsel and ask whether Microsoft would agree to stipulate to any of the facts that appear in Motorola's submission. Microsoft had never seen this particular selection of statements before Motorola filed it, and certainly has never agreed that this collection should be presented to the jury as "stipulated facts," particularly in the context in which Motorola's submission presents them. Motorola's treatment of statements from the parties' timelines as "stipulated facts" for presentation to the jury is particularly inappropriate, as the Court plainly requested those timelines for the Court's reference in resolving disputed issues between the parties—including disputes about facts on those timelines that one party or the other has argued should not be presented to the jury.

Microsoft contacted Motorola on August 19, requesting that Motorola withdraw by noon today its improper submission of an instruction on "stipulated facts" that the Court did not request and that Microsoft did not agree to. *See* Ex. 1. Motorola refused to do so and in its response did not address the fact that its additional proposed instruction purported to consist of "stipulated facts." *See* Ex. 2. Instead, Motorola pointed to pages of the transcript in which the Court and parties discussed the preliminary instructions, including where Motorola's counsel stated, "We will work with Microsoft to see if we can come to an agreement." (8/13/13 Tr. 12:1–2.) But Motorola did not do so.

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August 20, 2013  
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The parties' Pretrial Order contained a section of facts to which the parties agree. (*See* Dkt. No. 803 at 5–7.) Microsoft is willing to work with Motorola to identify additional stipulated facts for the benefit of the jury, but is not willing to allow Motorola to unilaterally declare what the parties have stipulated to.

Very truly yours,

CALFO HARRIGAN LEYH EAKES LLP

A handwritten signature in black ink, appearing to read 'Arthur W. Harrigan, Jr.', with a stylized flourish at the end.

Arthur W. Harrigan, Jr.

cc: All Counsel (via ECF)

**CERTIFICATE OF SERVICE**

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 20th day of August, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 20th day of August, 2013.

s/ Florine Fujita  
FLORINE FUJITA

# EXHIBIT 1

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**From:** Robbins, Ellen S.  
**Sent:** Monday, August 19, 2013 10:06 PM  
**To:** 'MicrosoftvMotoBreachofRANDCase@quinnemanuel.com'; 'summit1823@summitlaw.com';  
Project-MS/Moto\_WDWA\_343/1823; 'chrisw@dhl.com'; 'shanec@calfoharrigan.com';  
'harrigan@seanet.com'  
**Subject:** Revised Instructions

Counsel,

We write concerning Motorola's submission of its Defendants' Revised Proposed Preliminary Instructions, and to request that Motorola withdraw, by noon tomorrow, Motorola's Revised Proposed Preliminary Instruction No. 18 and Final Instruction No. 11 on "stipulated facts." (See Dkt. No. 857 at 7-11.)

Motorola's submission does not contain stipulated facts. As you are aware, Microsoft had never seen this particular selection of statements before Motorola filed it, and certainly has never agreed that this collection should be presented to the jury as "stipulated facts." The "stipulated facts" are highly selective and present a one-sided view even of those facts on which the parties might have agreed had they entered into a stipulation, and correspondingly omit many other facts necessary to balance the presentation. For example, Motorola presents the May 2, 2012 infringement determination by the Mannheim court, but not this Court's April 12 or May 14, 2012 orders barring Motorola from enforcing any injunction in Germany. Motorola's "stipulated facts" also contain incorrect statements. For example, Motorola characterizes the IEEE LOAs as essentially identical to the ITU LOAs (see Dkt. No. 857 at 8:25--9:3), when in fact the IEEE LOAs required Motorola to license at "nominal competitive costs" (see FFCL ¶ 48).

Further, at the pretrial conference, the Court directed the parties to submit agreed or revised versions of Proposed Preliminary Instruction No. 2 only. The Court did not direct the parties to submit revisions of any other proposed instructions.

Motorola's submission is both misleading and improper. Please confirm that you will notify the Court by noon tomorrow that Motorola withdraws its Revised Proposed Preliminary Instruction No. 18 and Final Instruction No. 11

# EXHIBIT 2

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**From:** Andrea P Roberts [andreaproberts@quinnemanuel.com]  
**Sent:** Tuesday, August 20, 2013 12:07 PM  
**To:** Robbins, Ellen S.; Microsoft v Moto Breach of RAND Case; summit1823@summitlaw.com; Project-MS/Moto\_WDWA\_343/1823; chrisw@dhl.com; shanec@calfoharrigan.com; harrigan@seanet.com  
**Subject:** RE: Revised Instructions

Ellen,

We received your email. Our response is that Motorola's submission is consistent with the colloquy during the pretrial conference discussing the preliminary instructions and Motorola's representation that it would submit new instructions in light of the MIL orders, summary judgment order and court's discussion. See pages 8-12 of transcript. Our submission is intended to provide helpful information to the jury. If there are facts from the RAND order to which Microsoft objects, it can so object. If there are additional facts from the RAND order that Microsoft wishes to include in the instructions, it can so propose. Given the court's order on Motorola's MIL 1, we are happy to work with you to develop ways to present aspects of the RAND order to the jury.

Andrea

**Andrea Pallios Roberts**  
*Of Counsel,*  
Quinn Emanuel Urquhart & Sullivan, LLP

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-----Original Message-----

**From:** Robbins, Ellen S. [mailto:erobbins@Sidley.com]  
**Sent:** Monday, August 19, 2013 10:06 PM  
**To:** Microsoft v Moto Breach of RAND Case; summit1823@summitlaw.com; Project-MS/Moto\_WDWA\_343/1823; chrisw@dhl.com; shanec@calfoharrigan.com; harrigan@seanet.com  
**Subject:** Revised Instructions

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